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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 19[illegible].

No. 755

JOHN FRANCIS CLEMENTS, an Infant,
By JESSE FRANKLIN CLEMENTS,
His Next Friend,

Petitioner,

vs.

CLEVELAND & CHICAGO MOTOR EXPRESS COMPANY, a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Authorities Cited.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, John Francis Clements, an infant, by Jesse Franklin Clements, his next friend, respectfully shows:

I.

Improper selection of jurors.

The petitioner (plaintiff in the trial court) brought an action against the respondent (defendant in the trial court) in the United States District Court for the Northern District of Illinois, for damages resulting from personal injuries.

It was alleged that the petitioner, John Francis Clements, a child six years of age, was crossing a street intersection in a closely built up residence neighborhood having the green light in his favor. The driver of respondent's truck crossed the intersection at a high rate of speed and failed to observe the statutory regulations requiring the slackening of speed at street intersections and the exercise of due care upon observing small children in the highway. The child suffered extreme injuries, but the jury found respondent not guilty.

As one of the grounds for a new trial, petitioner contended that he was not given a constitutional jury; it was not a cross-section of the community, but was picked by the jury commissioners, having attributes and qualifications vastly different from a jury drawn from a cross-section of the community—jurors whose inclinations, sentiments and feelings would not be sympathetic with the petitioner's claim.

It appears from an examination of the records that an unduly high percentage of persons of certain vocations were selected to the exclusion of others; also that the educational qualifications of the jurors were much higher than those of jurors taken from a cross-section of the community.

For the purpose of determining what would be a fair cross-section of the community, Petitioner refers to Volume 2 of Characteristics of Population for the Chicago Metropolitan District of the 16th Census of the United States, 1940. On page 9 will be found classifications of the various occupations included in each major occupation group. There are 12 separate classifications, including professional workers, semi-professional workers, farmers and farm managers, proprietors, managers and officials, clerical sales and kindred workers, craftsmen and foremen, operatives and kindred workers, domestic service workers, farm laborers, farm laborers (unpaid family workers), and laborers (except farm).

According to this report, of the total population in the Chicago Metropolitan District there were the following percentages engaged in the various classifications:

Professional workers	6.8%
Farmers and farm managers	.2%
Proprietors, managers and officials (except farm)	8.7%
Clerical sales and kindred workers	26.3%
Craftsmen	14.5%
Operatives	21 %
Domestic service workers	3.1%
Service workers (except domestic)	10.2%
Farm laborers and foremen	.2%
Farm laborers (unpaid)	.1%
Laborers (except farm)	7.1%

It appears from the affidavits filed in support of petitioner's motion for new trial that 15% of the persons whose names were in the jury box for each of the months of January, February and March, 1947, were proprietors, managers and officials, and that 7% of such persons were housewives unemployed but whose husbands were proprietors, managers and officials; whereas it appears from

the 1940 United States Census that 8.7% of the population in the Chicago Metropolitan District were classified as proprietors, managers and officials (Rec. 141).

There were drawn for the panel almost twice as many persons as there should have been who were proprietors of businesses or had managerial positions.

Although it appears from the Census of 1940 that there were in this area 7.1% engaged as laborers, they were excluded from the panel.

It appears further from the Census of 1940 that 38% of the population attended grade school, 15% attended high school, and 5½% attended college (page 655).

According to the tabulations made by the Clerk of Court from his records, 23.5% attended grade school, 48% attended high school (Rec. 126) and 26.5% attended college (Rec. 127). It thus appears that in the panels were more than three times as many persons having attended college as would be found in a true cross-section of the community, and there were 29% more persons having attended high school than there would have been had the jury been drawn from a true cross-section of the community.

It further appeared that during the three months period under examination 8 out of 319 jurors drawn were employees of the Illinois Bell Telephone Company (Rec. 142). The jury commisioners had on hand more than 100 questionaires of employees of the Illinois Bell Telephone Company held in reserve (Rec. 107). The Clerk of Court testified that, in addition to the regular pay received by all jurors, the employees of the Illinois Bell Telephone Company were paid their salaries by their employer (Rec. 113).

Experience has shown that jurors of this type are not fair to personal injury claimants.

Upon his motion for a new trial petitioner claimed that he was deprived of a fair trial because he was not provided with a jury of proper qualifications.

An appeal was taken by respondent to the United States Circuit Court of Appeals for the Seventh Circuit. That court affirmed the judgment without opinion.

This petition is filed to induce the Supreme Court of the United States to reverse the judgment of the United States Circuit Court of Appeals.

II.

Basis of Jurisdiction.

The jurisdiction of this Court is invoked to correct an error in failing to provide a jury in accordance with the Seventh Amendment to the Constitution of the United States.

The decision was rendered by the United States Circuit Court of Appeals without opinion on January 22, 1948 and is not reported.

The right to trial by an impartial jury means that prospective jurors must be selected by court officials without systematic and intentional exclusion of any group, or the intentional inclusion of particular groups or classes. It is the duty of the Supreme Court of the United States, in the exercise of its power of supervision of the administration of justice in the federal courts, to reverse a judgment where it appears that by reason of the method adopted by the jury commisioners in selecting jurors certain classes were selected and other classes excluded,

so that the jury was not comprised of persons representative of a true cross-section of the community.

In these circumstances the question is: May the jury commissioners consciously select for jury panels persons who are either proprietors of business or hold managerial positions with such proprietors, to the exclusion of persons engaged as laborers and persons whose educational qualifications are higher than are representative of a true cross-section of the community?

III.

Reasons for allowance of writ.

The Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court. Its decision on that question is probably in conflict with the applicable decisions of the Supreme Court of the United States. It is submitted that these reasons call for the exercise of this Court's power of review.

IV.

Petition.

Wherefore petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court commanding the United States Circuit Court of Appeals for the Seventh Circuit to certify and send to this Court, for its review and determination, on a day certain named therein, a complete transcript of the record in the case numbered and entitled on its docket as No. 9465, John Francis Clements, by Jesse Franklin, Clements, his next friend, v. Cleveland & Chicago Motor Express Company; that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit

be reversed by this Court; and that the petitioner may have such other and further relief as it deems just.

Respectfully submitted,

John Francis Clements, an infant,
by Jesse Franklin Clements, his
next friend, Petitioner

By ROYAL W. IRWIN,
Attorney for Petitioner.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner Was Denied a Constitutional Jury.

The law requires that a jury shall be representative of all classes; that neither the rich nor the poor, the educated nor the unintelligent, shall have any advantage. Our system of justice contemplates a jury representative of all classes and all strata of society. It is improper for the jury commissioner to consciously select jurors a higher percentage of whom are engaged in certain

vocations or are more highly educated than would be representative of a cross-section of the community.

For the purpose of determining what would be a fair cross-section of the community, petitioner refers to Volume 2 of the 1940 United States Census for the Metropolitan District of Chicago.

It appears from the record that 15% of the persons selected by the jury commissioners were proprietors, managers and officials; in addition thereto were 7% who were housewives not engaged in any business but whose husbands were proprietors, managers and officials; whereas, as appears from the census, only 8.7% of the population were classified as proprietors, managers and officials (Rec. 141).

There were drawn almost twice as many persons who were proprietors or had managerial positions as there should have been.

Although it appears from the census that there were in this area 7.1% engaged, as laborers, there were substantially no laborers to be found in the panel.

The jury commissioners selected more than three times as many persons having attended college as would be found in a true cross-section of the community, and they chose 29% more persons having attended high school than there would have been had the jury been drawn from a true cross-section of the community.

The clerk of court, who acts as a jury commissioner, testified as to the manner in which jurors were selected. It appeared from his testimony that the jurors selected were consciously chosen by the jury commissioners having in mind the information as to their vocations and educations as shown by their questionnaires (Rec. 106). Inasmuch as the same disproportions occurred in three

separate months, it is apparent that the jury commissioners intended the results which they obtained. The fact that the jury commissioners may have felt that the interests of society might best be served by selecting jurors of certain educational qualifications or social status does not excuse them for failure to follow the law.

It is difficult to explain the motive of the jury commissioners in selecting an undue proportion of employees of the Illinois Bell Telephone Company. Out of 319 drawn over the three months period, 8 of the jurors were employees of that company (Rec. 142). The jury commissioners had on hand more than 100 questionnaires of employees of the Illinois Bell Telephone Company (Rec. 107) kept in reserve. The only explanation the jury commissioner had to offer was that, in addition to the regular fee which all jurors received, these employees were paid their salaries during the time they were in jury service, and thereby received double pay for their time (Rec. 113).

The pay which these jurors received for their time was different than the pay received by other jurors. Such a practice seems extremely undemocratic. We are required to perform jury service as a civic function. It is not to be expected that citizens are to engage in the function of jury service on a business basis or for profit. It is un-American and contrary to our traditions to permit certain jurors to receive pay in addition to the regular fee paid to all other jurors. The situation is fraught with danger if jurors are permitted to receive extra money for their services from outside sources.

The Supreme Court of the United States has recently decided a case which is much in point. In the case of *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 90 L. Ed. 1181, it appears that in California a jury was selected

where there was a conscious endeavor to avoid laboring men. The Court said at page 924:

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. *Smith* v. *Texas,* 311 U. S. 128, 130, 85 L. Ed. 84, 86, 61 S. Ct. 164; *Glasser* v. *United States,* 315 U. S. 60, 85, 86 L. Ed. 680, 707, 62 S. Ct. 457. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury. * * *

"The undisputed evidence in this case demonstrates a failure to abide by the proper rules and principles of jury selection. Both the clerk of the court and the jury commissioner testified that they deliberately and intentionally excluded from the jury lists all persons who work for a daily wage. * * *

"It was further admitted that business men and their wives constituted at least 50% of the jury lists, although both the clerk and the commissioner denied that they consciously chose according to wealth or occupation. Thus the admitted discrimination was limited to those who worked for a daily wage, many of whom might suffer financial loss by serving on juries at the rate of $4 a day and would be excused for that reason.

"This exclusion of all those who earn a daily wage cannot be justified by federal or state law. Certainly nothing in the federal statutes warrants such an exclusion. • • •

"Moreover, the general principles underlying proper jury selection clearly outlaw the exclusion practiced in this instance. Jury competence is not limited to those who earn their livelihood on other than a daily basis. One who is paid $3 a day may be as fully competent as one who is paid $30 a week or $300 a month. In other words, the pay period of a particular individual is completely irrelevant to his eligibility and capacity to serve as a juror. Wage earners, including those who are paid by the day, constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status. We would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do."

The clerk of court testified that to obtain lists of names of prospective jurors he mailed a form letter to civic and religious organizations, clubs, parent-teachers' organizations, business men's organizations, churches, women's clubs, social clubs, including Austin Women's Club, Hyde Park Women's Club, Federation of Women's Clubs, League of Women Voters, Lions, Kiwanis, American Legion and Auxiliaries (Rec. 103). To those on the lists obtained from these organizations he mailed a questionnaire (Rec. 104). We do not believe that the names of prospective jurors should be obtained in that manner. As will be seen from the names the names of the organi-

zations mentioned, they are not truly representative of the people. Bias and prejudice is bound to result.

A few years ago a jury was challenged because of the fact that the women were selected from the Illinois League of Women Voters.

In the case of *Glasser* v. *United States,* 315 U. S. 59, 86 Law. Ed. 680, 707-708, the Court said:

> "For the mechanics of trial by jury we revert to the common law as it existed in this country and in England when the Constitution was adopted. *Patton* v. *United States,* 281 U. S. 276, 74 L. ed. 854, 50 S. Ct. 253, 70 A.L.R. 263. But even as jury trial, which was a privilege at common law, has become a right with us, so also, whatever limitations were inherent in the historical common law concept of the jury as a body of one's peers do not prevail in this country. Our notions of what a proper jury is have developed in harmony with our basis concepts of a democratic society and a representative government. For 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.' *Smith* v. *Texas,* 311 U. S. 128, 130, 85 L. ed. 84, 86, 61 S. Ct. 164.
>
> "Jurors in a federal court are to have the qualifications of those in the highest court of the State, and they are to be selected by the clerk of the court and a jury commissioner. Judicial Code, secs. 275, 276; 28 U.S.C.A. Secs. 411, 412. This duty of selection may not be delegated. *United States* v. *Murphy* (D. C.), 224 F. 554; *Re Special Grand Jury* (D. C.), 50 F. (2d) 973. And, its exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class. *If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that*

competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. *Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties.*

"*The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial.* No matter how high principled and imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such method of selection are the more real when the members of those organizations from training or otherwise acquire a bias in favor of the prosecution. The jury selected from the membership of such an organization is then not only the organ of a special class, but, in addition, it is also openly partisan. If such practices are to be countenanced, the hard won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions." (Emphasis ours.)

In the case of *Ballard* v. *United States,* 91 Law Ed. Adv. of 195 91 Law Ed. 195, it was held reversible error to exclude women from grand petit jury panels. The Court said (page 199):

"The point illustrates that the exclusion of women from jury panels may at times be highly prejudicial to the defendants. But reversible error does not de-

pend on a showing of prejudice in an individual case. The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group, *Smith* v. *Texas,* 311 U.S. 138, 85 L. ed. 84, 61 S. Ct. 164, or an economic or social class, *Thiel* v. *Southern P. Co.,* 328 U.S. 217, 90 L. ed. 1181, 66 S. Ct. 984, *supra,* deprives the jury system of the broad base it was designated by Congress to have in our democratic society. It is a departure from the statutory scheme. As well stated in *United States* v. *Roemig* (D. C. Iowa), 52 F. Supp. 857, 862, 'Such action is operative to destroy the basic democracy and classlessness of jury personnel.' It does not accord to the defendant the type of jury to which the law entitles him. It is an administrative denial of a right which the lawmakers have not seen fit to withhold from, but have actually guaranteed to him.' Cf. *Kotteakos* v. *United States,* 328 U. S. 750, 90 L. ed. 1557, 66 S. Ct. 1239. The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."

Petitioner Has Not Waived His Objections to the Panel of Jurors.

Counsel for respondent will probably urge that petitioner has waived his right to object to the jury.

It is true that in most cases where the question has been raised it was done by motion to quash the *venire,* but in a rather recent case considered by the United States Supreme Court the question was raised by a motion for new trial and no criticism was made of that practice.

In *Glasser* v. *United States,* 315 U. S. 86, after the trial of the case, and on a motion for new trial, it was urged for the first time that the petit jury was improperly

drawn. An appeal was allowed to the United States Supreme Court. The following appears in the opinion (page 419):

> "All the petitioners contend that they were denied an impartial trial because of the alleged exclusion from the petit jury panel of all women not members of the Illinois League of Women Voters. *In support of their motions for a new trial Glasser and Roth* filed affidavits which are the basis of petitioners' presents contentions. Kretske did not file an affidavit, but urges the point here.
>
> "Glasser swore on information and belief • • • that women not members of the League, but otherwise qualified, were systematically excluded, by reason of which affiant 'did not have a trial by a jury free from bias, prejudice, and prior instructions, and as a result thereof the jury was disqualified and this affiant's rights were prejudiced in that he was deprived of a trial by jury guaranteed to him by the laws and the Constitution of the United States of America, and particularly the Fifth and Sixth Amendment, all of which he offers to prove.' • • • *The court overruled the motion for a new trial.*" (Emphasis ours.)

The opinion of the Court clearly indicates that it was proper to raise the question of an unconstitutional jury by way of motion for new trial.

An Infant Cannot Waive His Constitutional Rights.

The petitioner, at the time of the trial, was an infant six years of age, and was incapable of waiving any of his constitutional rights.

Nor was it within petitioner's power to waive that right and accept any other jury.

In *People ex rel. Battista* v. *Christian,* 249 N. Y. 314, 164 N. E. 111., 61 A.L.R. 793, the Court of Appeals of New York held that where fundamental rights and public

policy were involved, such rights and policy transcended individual desires and could not be waived by the individual concerned. The Court said:

> "Many judicial opinions can be found in which declarations are made that constitutional rights and privileges may be waived. Most of these expressions occur in civil actions. (Cases cited.) From this mass of opinions and decisions, the rule can be deduced that waiver is not permitted where a question of jurisdiction or fundamental rights is involved and public injury would result. A privilege, merely personal, may be waived; a public fundamental right, the exercise of which is requisite to jurisdiction to try, condemn and punish, is binding upon the individual, and cannot be disregarded by him. *The public policy of the State as expressed in the Constitution takes precedence* over his personal wish or convenience * * *" (Italics supplied.)

Clearly, the Seventh Amendment to the Federal Constitution confers not a privilege but a right and is a mandate to the courts created under the Constitution to enforce that right— to make available to litigants a "constitutional jury".

One learned writer says:

> "But it seems to us that an agreement to waive a legal privilege which the law gives as a matter of State policy cannot be binding upon a party, unless the law itself provides for the waiver." (Cooley's Constitutional Limitations, Eighth Ed., page 598.)

Moreover, the courts indulge every reasonable presumption against waiver of basic constitutional rights and do not presume acquiescence in the loss of such rights. (See *Aetna Ins. Co.* v. *Kennedy,* 301 U. S. 389; 393; *Hodges* v. *Easton,* 106 U. S. 408, 412, and *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 307.

Except in a very few States, because the law jealously guards the rights of infants and because they are wards of the court and are not to be prejudiced by any act or default of their next friend or guardian, and for the reason that the court is bound to protect their interests notwithstanding the failure of their representatives to do so, the rule is that the court itself will protect their interests, although objection or exception or other technical maneuver was not taken in apt time.

In *McReynolds* v. *Miller,* 372 Ill. 151, 153, the Supreme Court of Illinois said:

> "• • • When the property rights of an infant are in litigation and the infant is in court, he at once becomes the ward of the court, whose duty it is to see that his rights are properly protected. The law contemplates a defense, in fact, so far as is necessary to protect the interests of the ward. *The Court is bound to specially guard the interests of minors, and to notice legitimate and substantial objections whether raised by the guardian or not.* • • •." (Italics supplied.)

Literally hundreds of cases hold that a minor's rights are not waived by his failure to conform to the tribunal requirements of procedure.

Nor can an infant's guardian or next friend waive or admit away any of the substantial rights of the minor.

In *Harris* v. *Young,* 298 Ill. 319, the guardian *ad litem* entered into a written stipulation as to certain facts. These facts were supplied to the attorneys by one who would have been an incompetent witness at the trial. After stating the duty of courts to protect minors, the Court said, page 331:

> "• • • We hold this stipulation is incompetent against the minor and that it was error to permit it to be admitted against her, although the stipulation was signed by the guardian *ad litem.*"

For other cases holding that substantial rights of a minor may not be waived by his next friend, guardian or attorney, see:

Kroot v. *Liberty Bank of Chicago*, 307 Ill. App. 209.

Leonard v. *Chicago Title & Trust Co.*, 287 Ill. App. 397.

Stevens v. *Wood*, 196 Iowa 1394, 195 N. W. 239.

Rausch v. *Cozian*, 86 Colo. 389, 282 P. 251.

Suter Bros. v. *Hebert*, 133 Kan. 262, 299 Pac. 627.

Keenan v. *Flanaghan*, 50 R. I. 321, 147 Atl. 617.

A question that might very naturally arise in the mind of the Court is, what authority does a next friend, guardian or attorney have to bind an infant? The rule, as stated in *Kingsbury* v. *Buckner*, 134 U. S. 650, 680, is:

> " * * * It is undoubtedly the rule in Illinois, as elsewhere, that a next friend or guardian *ad litem* cannot, by admissions or stipulations, surrender the rights of the infant. The court, whose duty it is to protect the interests of the infant, should see to it that they are not bargained away by those assuming, or appointed, to represent him. But this rule does not prevent a guardian *ad litem* or *prochien amy* from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved * * *" (such as agreeing that the case could be heard in a different division of the court when such agreement would result in a more speedy determination of the cause).

In *United Workmen et al.* v. *Zuhlke*, 129 Ill. 298, the Court said (page 307):

> "It thus appears that the judgment of expulsion rests upon the appearance of the accused (before a lodge committee), and upon his admissions of facts. Appearance and admissions involve the element of consent. If a man is brought into court,

not by service of process, but by an entry of his appearance, he must be intelligent enough to comprehend the meaning of his act. If he admits a fact to be true, such admission cannot bind him, unless he has mental capacity enough to understand its force and effect."

Prejudice to the Petitioner Need Not Be Shown.

The argument that prejudice to petitioner must be shown is completely answered by the Supreme Court in *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, where, at page 225, it is said:

> " • • • On that basis it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class. (Cases cited.) It is likewise immaterial that the jury which actually decided the factual issue in the case was found to contain at least five members of the laboring class. The evil lies in the admitted wholesale exclusion of a large class of wage earners in disregard of the high standards of jury selection. To reassert those standards, to guard against the subtle undermining of the jury system, requires a new trial by a jury drawn from a panel properly and fairly chosen."

PRAYER.

It is urged that this Petition for Certiorari be granted to permit a full consideration of the matters involved, to the end that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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